JA'AFAR IBRAHIM

v.

GAN KIM KIN

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL SUIT NO. 278 OF 1979]
5 JUNE 1984

CONTRACT: *Contingent contract - Transfer of half share of land - Conditional upon application for subdivision being approved by a fixed date - Condition unfulfilled at the date - Effect.*

By a written agreement, the defendant who was the owner of the registered property of the land in question, agreed to give half share of the said land to the plaintiff (the agent) in consideration of him agreeing to pay all requisite fees and expenses to be incurred in connection with the subdivision of the land. The application for such subdivision was to be made and all matters incidental to the application were to be handled by the agent. On transfer of half share of the land before as security for the expenses to be incurred in making the application for subdivision and pending its approval, a retransfer of half the share was to be signed and held by a solicitor as a stake holder. Clause 4 of the agreement set a deadline for the continuing validity or the termination of the agreement. If the application for subdivision was not approved by 31 December 1977 the owner would ask for the retransfer to be effected and the agreement would become null and void.

The application for subdivision was not approved by 31 December 1977 and the retransfer in favour of the half share was duly released by the share holder to the owner for registration. The application for subdivision was later approved on or about 18 July 1980.

The agent sought:

(a) damages and specific performance of the agreement and the consequential retransfer of half share of the land for breach of contract.

(b) breach of an oral agreement to draw up a fresh contract for retransferring the half share to the agent before the agent paid the conversion fees to the authorities and

(c) damages for fraudulently misrepresenting or dishonestly or negligently allowing the period for payment of the conversion fees to lapse and thereafter the defendant paying such conversion fees herself without the knowledge of the agent who was induced to wait for the retransfer first.

Held:

[1] The agreement should be construed as a conditional contract or contract subject to a contingency. Where a conditional contract of sale fixes the date by which the condition is to be fulfilled then the date so fixed must be strictly adhered to. Even if the agreement was not a contingent contract the parties must have intended that time was to be of the essence of the contract. The agreement therefore became void on 31 December 1977.

[2] On the facts there was no subsequent oral agreement. Nor did the owner falsely, fraudulently or negligently induce or misrepresent to the agent in respect of the facts and in the manner as alleged.

[Plaintiff's claim dismissed with costs. Defendant's counter-claim allowed with costs.]

Case referred to:
Aberfoyle Plantations Ltd. v. Khaw Bian Chong [1960] MLJ 47

For the plaintiff - N. Ramachandran (Seeralan with him); M/s. Mahadevi Ganeshmurugan & Co.
For the defendant - Khaw Chay Tee; M/s. Allen & Gledhill & Co.

JUDGMENT

Peh Swee Chin J:

On 5 November 1975, the parties here entered into a rather unusual agreement in writing. By the agreement (A1 or p. 1 of the agreed bundle of documents marked 'A'), the defendant, (the owner), the registered proprietor of the land in question, being desirous of subdividing the land, agreed to give ½ share of the said land to the plaintiff, (the agent), in consideration of the agent agreeing to pay "all requisite fees and expenses (including conversion and survey fees) to be incurred in connection with such subdivision". The application for such subdivision was to be made, and all such matters incidental to such application, were to be handled by the agent. This was a common ground at the trial and was readily assumed by both parties as an obligation on the agent, though the same was not very clearly set out in (A1). Both parties agreed that, to quote, "as security for the fees and expenses to be expended by the agent in connection with the intended application for subdivision of the said land", the owner agreed to transfer, beforehand, and did transfer ½ undivided share of the said land, so that the application for the subdivision was to be in joint names of the owner and agent as registered co-proprietors. It became increasingly clear as the trial went on that the device of transferring ½ share beforehand was also to make the authorities to whom the application was to be made, aware of the presence of the name of the agent, so that, it was believed, the application would be processed sooner or more favourably. It became equally clear at the trial, that the agent had considerable experience in applications of this kind, so that other things being equal, the application would be for this reason also, processed with expedition. On transfer of ½ share of the land beforehand, and pending the approval of the application for subdivision, a retransfer of ½ share was to be signed and held as "stake holder" by Mr. Seah Choon Chye, a well-known Seremban solicitor, who prepared (A1). This was duly carried out. Now comes the crucial part of (A1) i.e. Clause 4 which I will set out below:

> 4. PROVIDED THAT:
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> (1) In the event the said application for subdivision is not approved on or before 31 December 1977, or if the Agent shall pass away before the approval of the said application on or before the said date, the Landowner or her nominees may on the occurrence of either of the events aforesaid accept the transfer referred to in the preceding Clause and thereupon this Agreement shall become null and void and of no further force or effect and neither party shall have any claim against the other in connection with this Agreement.
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> (2) In the event the Agent shall pass away on or after the approval of the said application but prior to the issue of the qualified titles, the said transfer referred to in the preceding Clause may be accepted by the lawful widow of the Agent and the provisions of this Agreement shall remain valid and binding on the Landowner and the Agent's widow as if the said widow had been a party hereto.

Clause 4 set a deadline for the continuing validity or the termination of the agreement or (A1), i.e. if the application for subdivision was not approved by 31 December 1977, the owner would ask for the retransfer to be implemented and therefore, to quote - "this agreement shall become null and void and of no further force ...". A race against time fixed was therefore

set in motion on the signing of (A1), and it was not disputed, that by 31 December 1977, the application for subdivision was not approved, and the retransfer in favour of ½ share was duly released by the stake-holder to the owner for registration. Subsequently this action was filed. The application for subdivision was later approved on or about 18 July 1980 though the application for conversion of the land, (into building land) was approved earlier i.e. on or about 13 November 1978, a date still subsequent to the date in Clause 4 set out above.

The agent now seeks in this case:

(a) damages, specific performance of (A1) and the consequential retransfer of ½ share of the land etc. for breach of contract i.e. (A1);

(b) breach of an oral agreement, or alternately an oral agreement to draw up a fresh contract, in both cases for retransferring the ½ share to the agent first before the agent paid the conversion fee to the authorities, and

(c) damages for fraudulently misrepresenting, or dishonestly or negligently allowing the period of paying for conversion fee to lapse and thereafter, paying such conversion fee herself without the knowledge of the agent who was presumably induced to wait for the retransfer first.

The amended statement of claim lacks clarity and what is stated above is what the Court gathers from it by putting it at the highest for the purpose of completely determining all the issues of the case. The owner denies the claim of the agent and counter-claims an order for removing the caveat and lodged against the land by the agent in question, and damages for wrongful entry of such caveat etc.

On the agent's claim for damages or specific performance of (A1), one must take a good and hard look at it. On a true construction, (A1) would be annulled or become void on the happening of an event, i.e. if the application for subdivision of the land made to the relevant authorities, (over which both parties had no control, not involving, of course any omission or fault of the agent in submitting such an application), was not approved by 31 December 1977. The validity of (A1) depended on this approval of his application by this date, and the existence of mutual obligations depended on this condition of approval by the relevant authorities by 31 December 1977. From the evidence of the parties, forming the background of (A1), the essentiality of the speed of approval of the application for subdivision or to put it more succinctly its approval by 31 December 1977, was for both parties, as regards (A1), everything or nothing. (A1) should in my view be construed as a conditional contract or contract subject to a contingency, i.e. conditional on, or contingent on the approval of the application by that specified date. What then would be the position of such a contract in regard to the equitable rule that time shall not be the essence of a contract unless there is contrary intention by express words, or from by nature of the transaction or from surrounding circumstances? In this connection, one cannot ignore the Privy Council case of *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* [1960] MLJ 47. The *ratio decidendi* of that case is that a conditional contract or a contingent contract (i.e. the expression used in our Contracts Act, 1950), is wholly excluded from the operation of that equitable principle aforesaid. Lord Jenkins delivering the opinion of the Board, laid down the following special principles as applicable to a conditional contract:

(i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date;

(ii) Where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time;

(iii) Where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

Lord Jenkins' principle (iii), (although it refers to a conditional contract of sale), must apply, *mutatis mutandis*, to our instant case. In the *Aberfoyle* case, the sale of the rubber estate there was conditional upon the vendor there obtaining the approval of application for renewal of expired leases of part of the estate from the Ruler of Perak.

Should I be held wrong later that (A1) was not a conditional contract or contingent contract, just because the words "conditional" or "contingent" did not appear therein or for some other reason, then I would hold that the nature of the contract, i.e. (A1) herein was such, i.e. for the same reasons that have led me into construing it in the first place as a conditional contract or contingent contract, that parties must have intended that time was to be of the essence. It would not be necessary to discuss the cases cited by learned Counsel for the agent.

I hold that (A1) was annulled or became void on 31 December 1977 when the application for subdivision of the land was not approved by the relevant authorities on that day and the subsequent registration of the retransfer of ½ share of the land to the owner was completely proper and unquestionable.

I now deal with the question of the breach of subsequent oral agreement set out above. In her evidence, the owner said to the effect that she did not negotiate with or talk to the agent and the discussion with him was conducted by her husband or her son. She denied having agreed to transfer once more the ½ share of the land to the agent after the earlier registration of the retransfer of the said ½ share from the agent to the owner. She denied having agreed to a fresh agreement with the agent or having told the agent not to pay the conversion fee to the Government until the said ½ share was transferred to the agent once more. She also denied having granted any extension of time to the agent after the deadline passed, and in this, curiously enough, the agent, in his evidence also said he was never informed, verbally or by notice of such extension. Thus, on these vital points of evidence, on which the agent sought to find an agreement subsequent to A1, there was a sharp conflict between the agent's evidence and that of the owner.

I have seen the owner in the box; she behaved exactly like one of those uneducated, unsophisticated simple, but apparently dedicated housewives. Housewives like her, not infrequently, do depend on their husbands or children to negotiate with other men on their behalf about selling any land given by their husbands. In view of her having the bulk of the work of the application for subdivision done virtually *gratis* for her benefit, and having the land intact, if she succeeded in this action, I had to be really satisfied if she was staging an act of naivety in the witness box, bearing in mind also that she had signed her name in English in fairly good handwriting. I have found her to be the type of a housewife who is only too contented to leave matters, outside the domestic affairs, to the menfolk in her family. I therefore accept her evidence as against the evidence of the agent. It will be remembered that DW1, the solicitor also said in evidence that it was the husband and one of the owner's sons who gave instructions to him. Her son and husband, of course gave evidence which corroborated hers.

Again, in connection with the evidence set out above, I found considerable force in learned Counsel's submission that after the deadline passed, the land had been retransferred to her sole name and the agreement had become null and void, the owner had nothing to gain by making the representations allegedly made by her.

In the result, though the Court's sympathy is unreservedly with the agent who had done so much for the benefit of the defendant, but would have to lose his bargain, I hold further that the owner did not falsely, fraudulently or negligently induce or misrepresent to the agent in a subsequent oral agreement to transfer once more the said ½ share to him etc., and that there was no such subsequent oral agreement as alleged by the agent and set out above.

I now deal with the defendant's counterclaim for an order removing the caveat in question. Such an order will obviously follow the dismissal of the agent's claim.

I therefore dismiss the claim of the plaintiff with costs; allow the counterclaim of the defendant by making an order for the removal of the caveat in question as counterclaimed with costs with a further order for damages for wrongful entry of such caveat by the plaintiff to be assessed by the Senior Assistant Registrar of this Court, but the question of costs relating to such assessment of damages for such wrongful entry be reserved to the learned Senior Assistant Registrar.

Also found at [1984] 2 CLJ 175